RECORD NUMBER: 17-4458

United States Court of Appeals

for the

Fourth Circuit

UNITED STATES OF AMERICA,

Plaintiff/Appellee,

– v. –

ERIC SCOTT,

Defendant/Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA AT ANDERSON

OPENING BRIEF OF APPELLANT

C. RAUCH WISE
ATTORNEY AT LAW
305 Main Street
Greenwood, SC 29646
(864) 229-5010

Counsel for Appellant

COUNSEL PRESS • VA – (800) 275-0668

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STATEMENT OF JURISDICTION

A. District Court Jurisdiction

The United States District Court for the District of South Carolina has jurisdiction pursuant to 18 U.S.C. § 3231 for violation of the laws of the United States of America.

B. Appellate Court Jurisdiction

This appeal is from a final judgment. Eric Scott was sentenced to life imprisonment on July 13, 2017 and filed his Notice of Appeal on July 14, 2017. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. Did the trial Court err in failing to quash the indictment for a conspiracy to distribute cocaine, cocaine base, and marijuana that started in 2003 when Eric Scott had entered a guilty plea in 2006 to a charge of conspiracy to distribute cocaine when the charge in 2006 involved persons known and unknown to the grand jury and the testimony at trial established that Joel Bello-Henriquez was the same supplier of cocaine in each conspiracy?

II. Did the trial Court err in failing to give a charge of withdrawal from the conspiracy when the testimony established that Eric Scott was imprisoned from March 2007 until April 2011 and that he told others, including two co-

conspirators that he was not going to be involved in the drug business after his release from prison which would have barred this prosecution due to the statute of limitations?

III. Did the trial Court err in preventing counsel for Eric Scott from cross examining Joel Bello Henriquez as to his expectation of a three to five year sentence instead of 12-15 years when Mr. Bello made the statement to relatives over the telephone and during visitations as well as preventing cross examination of Derrick Jones as to his being told he was facing a life sentence?

IV. Did the trial Court err in failing to give a jury charge that would have required the jury to find that the if the jury finds that Eric Scott did not participate in the conspiracy after he was released from prison, then the jury would have to find that the conspiracy with Mr. Bello before Mr. Scott went to prison was not part of the conspiracy to which Mr. Scott entered a plea?

STATEMENT OF THE CASE

Eric Scott was indicted in a fifth superseding indictment on March 6, 2016. The Grand Jury indicted him along with twelve co-defendants for conspiracy to distribute more than 5 kilograms of cocaine, cocaine base, and marijuana beginning in 2003 and continuing up and until the date of the indictment. He was indicted in court 4 for false statement to a law enforcement officer in violation of

18 U.S.C. § 1001(a). On October 27, 2016 the trial of Mr. Scott along with co-defendants Antonio Crawley and Hou-God Productions, LLC commended before the Honorable Timothy Cain and a jury in Greenville, SC. Judge Cain conducted the trial from October 27, 2016 until November 8, 2016. At the close of the testimony, the Government dismissed the charges against Hou-God Productions, LLC. The jury convicted Mr. Scott of conspiracy to distribute cocaine and acquitted him of the conspiracy to distribute marijuana, conspiracy to distribute cocaine base and false statement to a Drug Enforcement Agent.

The first indictment alleged the conspiracy began at a time unknown but at least in the year 2008. On May 20, 2015, the Second superseding indictment moved the date back to the year 2003. The same date was used in the Fifth superseding indictment. Mr. Scott filed a Motion to quash the indictment on the ground that it violated double jeopardy. In 2006 Mr. Scott had plead guilty to a charge of conspiracy to distribute cocaine. In the 2006 indictment, to which Mr. Scott entered a plea, the government alleged he conspired with persons known and unknown for the period from October 1, 2005 until February 14, 2006 to distribute more than five kilograms of cocaine. The Second superseding indictment included the entire time frame of the 2006 indictment to which Mr. Scott entered a plea.

After the Fourth superseding indictment, Mr. Scott, on February 26, 2016, filed a Motion to dismiss the superceding indictment on the ground that the indictment would subject him to double jeopardy for the plea he entered to the 2006 indictment for distribution of more than 5 kilograms of cocaine which covered part of the same time period. This Motion was denied by Judge Cain on April 14, 2016.

The Government on March 12, 2016 filed a Motion to exclude references to possible penalties of cooperating witnesses. On October 13, 2016 the Motion was granted by Judge Cain. At trial Mr. Scott again sought to cross-examine the witnesses as to their possible punishment or what punishment they were expecting to receive. Judge Cain sustained his prior rulings on the issue.

STATEMENT OF THE FACTS

In 2012 the Government started an investigation of cocaine distribution in the Anderson County, South Carolina area. According to Drug Enforcement Agent Jay Rajaee, the investigation consisted of wiretaps on telephones, poll cameras,[1] tracking devices on automobile and cell phones as well as actual visual surveillance of individuals including Eric Scott. In addition any computer in the

[1] Poll cameras are court ordered cameras that are erected on power or telephone polls to act as surveillance of a specific location. They can be observed by the internet from a remate site.

possession of Mr. Scott was searched.

During all the investigations of Mr. Scott, the officers never tapped the telephone of Mr. Scott. They only had him on a poll camera twice, neither of which showed Mr. Scott delivering anything, much less any drugs. The tracking devices on Mr. Scott automobile and telephone produced no useful information. The computer belonging to Mr. Scott produced no useful information. A search of the residence of Mr. Scott, the houses he was working on and the automobile he was driving did not find any drugs or drug paraphernalia. No secret compartment for hiding drugs was found in the residence of Mr. Scott or any house he was re-modeling. The sole evidence against Mr. Scott was the testimony of co-defendants and a potential co-defendant all of whom had reached an arrangement with the government. As will be shown, the testimony of the various witnesses was contradictory and at time impossible to have occurred.

The overall thrust of the case against Mr. Scott was that before, during and after he entered his plea in 2006 to conspiracy to distribute cocaine, Mr. Scott was actively engaged in the distribution of cocaine and marijuana in the Anderson area. As mentioned above, the Government had no evidence beyond the co-defendant testimony to establish Mr. Scott's alleged involvement in distribution of drugs after his release from prison and house arrest in April of 2011.

Mr. Scott, testifying in his own defense, denied being involved in any drug conspiracy or the use of cocaine after his release from prison. He testified that upon his release from prison, he renovated and sold a small house he inherited from his mother. He further testified that he bought houses at tax sales or foreclosures and either sold the houses or rented them. He introduced various titles to houses to establish this fact. He further testified that in 2014 he started assisting Quincy Collins with his restoration business in Atlanta, Ga. He had met Mr. Collins through a mutual friend.[2] The government introduced bank documents that showed numerous transactions between Mr. Scott and the company owned by Mr. Collins.

The government called Brian Stovall of the Franklin County Sheriff's office as their first witness as it relates to Mr. Scott. Mr. Stovall stopped an automobile being driven by Yaphet Thomas, a cousin of Mr. Scott's. Mr. Scott was a passenger in the automobile. App. at 141, l 15 to 142, l 2. When stopped, Mr. Scott informed the officer he was on probation and was not suppose to be leaving the State of South Carolina. App. at 143, ll 8-19. After Officer Stovall found

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[2] Quincy Collins and his business CRM Services, LLC were indicted by the Government in Count Two of a superseding indictment for money laundering. Included in the count was Hou-God Productions, LLC, an LLC owned by Mr. Scott. At trial the government never pursued the money laundering charges against Mr. Collins, his company or Hou-God Productions, LLC.

some money in the front seat, Mr. Scott informed the officer that he was going to Atlanta to purchase an automobile and meet another person about a business deal.[3] App. at 167, l 13 to 168, l 3. The automobile was searched by four officers, including Mr. Stovall. No illegal drugs were found. App. at 168, ll 4-19. Officer Stovall testified to finding 14 cell phones in the automobile. His partner only took pictures of a few phones on top of the automobile.

The government called Lonnie Maddox as a witness to establish when they first started investigating Mr. Scott. Mr. Maddox testified he met Mr. Scott in 2003 or 2004 and did drug transactions with him. App. at 172, ll 3-19. Mr. Maddox at the time of trial was serving a federal sentence. He stated he was arrested on January 20, 2013. He told the officers he had been doing business with Mr. Scott from 2003 until 2013. App. at 173, ll 8-13. He claimed to have been involved with Mr. Scott both buying and selling for over 40 kilograms of cocaine. App. at 174, ll 8-18. Mr. Maddox testified to numerous telephone calls where they would call each other. Mr. Maddox testified to at least three prior state charges for either distribution of drugs or the possession with intent to distribute. His federal charges would have been his fourth drug trafficking offense.

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[3] Mr. Scott introduced a bill of sale for an automobile purchased on the day of the stop. Def. Exhibit 4, App. at 1751, ll 13-25

Mr. Maddox testified as to having the phone number for Mr. Scott in his cell phone under the name "God." App. at 185, ll 89, ll 11-20. On cross-examination he admitted to having his cell phone with him when he was being interviewed. He never showed the officers interviewing him Mr. Scott's alleged phone number. He never offered to call Mr. Scott and arrange a drug deal, but he did offer to call another person. He in fact called that person and did arrange a drug deal for the officers. App. at 190, l 12 to 191, l 18. He then admitted that when he needed to talk to Mr. Scott he would have to call Mr. Scott's cousin to get Mr. Scott to call him. App. at 192, ll 7-15. He never sat down with the investigating officer and went over his cell phone bill or log of calls to point out which ones were allegedly from or to Mr. Scott. App. at 193, ll 9-18. This was not done by the investigating officers notwithstanding their belief that comparing cell phone calls was an effective investigating tool. App. at 1456, l 2 to 1457, l 5. He further testified that Jerome Martin was a witness to at least one transaction with Mr. Scott. App. at 201, ll 2-13. The Government never called Mr. Martin as a witness.

On re-direct the Government played a recording of a telephone conversation between Mr. Maddox and a third party. In the phone conversation Mr. Maddox made a reference to "Houli." He claimed he was referring to Mr. Scott App. at

217, l 21 to 218, l 5. The ambiguous conversation was interpreted by Mr. Maddox as to what the words and terms meant. And that the "Houli" mentioned was in fact Mr. Scott. The government never called as a witness the other party to the conversation.

Toby Jordan of the Anderson County Sheriff's office was call to testify about the pole camera placed at 5 Booker Street. He verified the pictures taken on March 28, 2014. The pictures establish that a Ridgeline SUV arrived at a detail shop and car washing facility operated by Derrick Jones. The Ridgeline arrived at 10:41 a.m. Shortly thereafter it pulled into the shop. App. at 233, ll 7-22. The tape of the day shows that Mr. Scott, driving a white Mercedes, arrived about 6 minutes after the Ridgeline was in the shop. App. at 234, ll 8-12. He observed Mr. Scott leave about 10:50 and was gone for about ten or eleven minutes. App. at 235, ll 9-11. Mr. Scott was not seen carrying anything into the shop or from the shop. App. at 252, ll 19-23. The Ridgeline was driven by a male who was the only occupant. App. at 251, l 20 to 252, l 2.

When the Ridgeline was next observed at a QT station, the male was driving but he had picked up a female passenger. App. at 259, l 8 to 259, l 1. No explanation was ever given as to how, when or where the driver picked up a female passenger. The officer observing the Ridgeline at the QT station never

testified the female started driving. When the Ridgeline was stopped near Commerce, GA, the female was driving the SUV. App. at 304, ll 18-21. Inside the Ridgeline in a secret compartment was found $464,465.00. App. at 311, l 21 to 312, l 1. The passenger in the Ridgeline was Densy Carcono.[4] An identifiable finger print was found on the packaging of the money, but it did not match Mr. Scott.

Derrick Jones, who was an indicted co-defendant, owned the business located at 5 Booker St. In Anderson, SC.[5] Mr. Jones testified he had known Mr. Scott for more than 10 years. He stated he started buying drugs from Mr. Scott shortly after Mr. Scott's release from federal prison. App. at 333, ll 3-6. He testified that sometimes he would cook the cocaine he purchased to make crack.[6] App. at 334, l 20 to 335, l 20. Mr. Jones confirmed that Mr. Scott was engaged in landscaping and the selling of automobiles after his release from prison. App. at 337, l 24 to 338, l 9. Contrary to the pictures introduced during the testimony of

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[4] Densy Carcano entered a plea and was sentenced to time served and no term of supervision. Docket Entry Nº 1089.

[5] Mr. Jones received a sentence of 108 months imprisonment. Docket Entry Nº 1493

[6] The testimony of Derrick Jones is the only testimony the Government used to support an indictment charge of conspiracy to distribute crack cocaine. Mr. Scott was acquitted of the crack cocaine charge.

Officer Jordan, Mr. Jones testified that Mr. Scott arrived prior the arrival of the Ridgeline driven by Densy Carcano. App. at 348, ll 5-11. He testified Mr. Scott asked about a "jack," but no "jack" was in the shop. App. at 350, l 12 to 4. He further testified he would contact Mr. Scott by cell phone. App. at 353, l 15 to 354, l 24. When Mr. Jones's house was searched on February 25, 2015, the officers found 389 grams of crack cocaine at the residence. App. at 358, ll 5-15. Mr. Jones denied he possessed 389 grams of crack cocaine. He contended it was only 200 grams. App. at 396, l 20 to 397, l 17.

Mr. Jones was arrested on March 8, 2015. Mr. Jones confirmed that the agents took his cell phone form his house when it was searched. App. at 383, l 22 to 384, l 13. The Government never produced any telephone records to establish any contact between Mr. Jones and Mr. Scott.

Mr. Walter Lee testified he first purchased cocaine from Mr. Scott in 2006. App. at 421, l 22 to 422, l; 424, l 4. His testimony on direct was that he had made a purchase from Mr. Scott after Mr. Scott's release from prison in 2011. App. at 456, ll 17-19; 457, l 7 to 463, l 15. Mr. Lee testified that he made a purchase from Mr. Scott on a back road in Centerville. App. at 462, ll 11-18. The Government never produced any tracking device evidence to show Mr. Scott was in the Centerville area at any time, much less around the time of this alleged sale. Mr.

Lee testified at trial that he purchased about 15 kilograms of cocaine from Mr. Scott after Mr. Scott was released from prison. In his June 15, 2016, pre-trial interview with the prosecuting attorneys and agent Ross Brown, Mr. Lee denied having had any drug dealing with Mr. Scott after his release from prison. As to that interview, Agent Ross Brown testified as follows::

> Q. (By Mr. Wise) You were present during an interview with Mr. Walter Lee on June 15th, 2016, weren't you?
> A. (By Mr. Brown) I was
> Q. That was an interview that you were responsible for making notes of?
> A. Yes sir.
> Q. And in that interview did Mr. Lee tell you that as you phrased it, "he slash she didn't deal directly with Scott after his parenthesis, Scott's parenthesis release from prison?
> A. Yes Sir.
> Q. That would be an accurate summation of the interview, yes sir.
> App. at 1038, ll 5-19.

Mr. Lee testified that on November 3, 2014 he purchased two kilograms of cocaine from Mr. Bello and sold one of those kilograms to his cousin, Vito Martin. App. at 553, ll 23 to 554, l 17. He testified he went to Mr. Martin house to deliver the cocaine. App. at 555, ll 13-20. He testified that he knew Mr. Matin was arrested on September 24, 2014. App. at 556, ll 13-15. In his defense, Mr. Scott established that Mr. Martin was arrested on September 24, 2014 and not released from the Anderson County jail until

December 18, 2014. App. at 1559, l 24 to 1560 l 8. The Government never introduced evidence of any other Vito Martin being arrested or living in Anderson County.

Anthony Bello Shanchez is the brother of Joel Bello Henriquez. He has not been charged in this conspiracy. He admitted he was testifying to avoid being arrested. App. 627, l 19 to 688, l 4. He admitted he incorrectly marked a picture as being Mr. Scott when it was not. He explained he got him confused with "Loquiro." App. at 640, l 8 to 641, l 14. The Government did not have a recording of that interview to explain the discrepancy or how it was corrected.

The Government had known about Anthony Bello Shanchez since the arrest of his brother in March of 2015. His brother had told him in about May of 2015 that the authorities may want to talk to him. App. at 669, ll 3-16. The initial interview with Mr. Shanchez did not occur until May 20, 2016, some 14 months after the agents knew of his name and location. App. at 669, l 23 to 670, l 11.

Mr. Shanchez testified he made four trips to South Carolina starting around the middle of November. App. at 667, ll 7-21. He testified he made the last trip after Thanksgiving of 2014. App. at 673, l 22 to 674, l 5. His

brother, however, testified he made only two trips on November 1 and November 3 of 2014. App. at 951, ll 14-25. He carried his cell phone with him and made calls to his relatives. App. at 668, ll 4-22. The Government never seized this cell phone to verify when he was in Anderson, SC. He claimed to have twice gone to a house that belonged to Eric Scott, but the Government never had him attempt to identify the house to which he claims he carried the drugs. App. at 649, ll 3-9; 650, l 18 to 651, l 10.

Damian Wakefiled, who had been at 5 Booker Street with Mr. Jones, also testified for the Government. Mr. Wakefield for the large part was paid to let people use his house as a place to sell drugs. He testified on direct that he came to 5 Booker Street after Mr. Scott arrived. App. at 750, l 22 to 751, l 6. He testified Mr. Scott was driving a blue truck. App. at 756, ll 17-24. He claimed that Mr. Scott asked him to move his car which he did.. App. at 751, l 16 to 752, l 12. He admitted on cross-examination that his car was not in front of the garage when Mr. Scott arrived and that Mr. Scott arrived in a white car. App. at 758, ll 6-25. As noted earlier, the testimony of Toby Jordan established that Mr. Scott arrived after the Ridgeline was placed inside the garage. The actual photographs refute the testimony of Mr. Wakefield.

Joel Bello Henriquez was the primary witness to connect Mr. Scott to the alleged conspiracy. Mr. Bello testified that he had been dealing drug with Mr. Scott since before Mr. Scott was arrested in 2006. He testified he has been selling drugs in South Carolina since 2002. He was arrested on March 17, 2015. This interview was the only recorded interview involved in this case..

When Mr. Scott went to prison in 2007, Mr. Bello stated he started dealing with Yaphet Thomas. He says he stopped dealing with Yaphet Thomas because Mr. Thomas could not sell the drugs. App. at 796, ll 3-10. He testified that Mr. Scott then put him in touch with Clarence Cunningham. App. at 796, ll 14-23. Mr. Cunningham denied this. App. at 1639, ll 1-10. According to Mr. Bello this communication with Mr. Scott occurred through a cell phone that he had provided to Mr. Scott while Mr. Scott was in prison. The Government never introduced any evidence of a cell phone in Mr. Scott's possession while in prison nor did Mr. Bello provide a number for the cell phone. According to Mr. Bello, Mr. Scott had the same cell phone when he was released from prison. App. 933, ll 15-22. He stated he met Mr. Scott the day Mr. Scott was released from prison or a few days later. App. at 932, ll 9-14. He assumed it was when Mr. Scott was

through with house arrest because he was in Atlanta. He admitted he told agent Rajaee that he started dealing with Mr. Scott after Mr. Scott got off house arrest. App. at 936, l 25 to 937, l 6.[7] Mr. Bello stated that he again started dealing with Mr. Scott a few month after the meeting.

Mr. Bello described several cocaine deliveries to the Anderson, SC area. He stated he delivered some cocaine, with Densy Carcano, to Mr. Scott in 2009 or 2010. App. at 818, ll 9-16. On March 31, 2011, Mr. Bello was stop with over a million dollars in cash in the truck he was driving. As a result he did not have access to cocaine until the year 2012. App. at 824, l 9 to 825, l 1. He testified he and Mr. Carcano came to Anderson to sell cocaine to Mr. Scott in 2008, 2009 and 20010. App. at 938, l 22 to 939, ll 10. He further stated that Mr. Carcano and himself made three or four trips to Anderson to sell drugs to Mr. Scott. App. at 940, ll 1-19. As Mr. Scott was in prison until near the end of 2010 and in a halfway house until after the beginning of 2011, he could not have met them to purchase any drugs during that period of time.

Mr. Bello stated that the largest delivery of cocaine was 22 kilograms

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[7] The testimony at the trial established that Mr. Scott was released from prison toward the end of 2010 and released from house arrest on April 9, 2011. App. at 1719, ll 22 to 1720, l 9.

that he delivered with his Joselito Olmo, his brother in law. App. 828, l 16 to 829, l 10. His brother in law never testified to delivering 22 kilograms of Mr. Scott. The most he testified to was 10 kilograms. App. at 1298, ll 15-19. Unlike the testimony of Mr. Bello, Mr. Olmo testified Mr. Scott paid all the money owed on that trip. App. at 1202, ll 17-24.

Mr. Bello testified to other alleged transaction with equally confusing and contradictory statements. For example, he testified that on November 1, 2014 he sold Mr. Scott between three and a half and four kilograms of cocaine. App. at 850, l 8 to 851, l 1. But later he said he did not sell any drugs to Mr. Scott on November 1, 2014. He said:

> Q. (By Mr. Moorman) So, did you sell any drugs to Mr. Scott on November 1?
> A. (By Mr. Bello) No, I didn't sell any.
> App. at 876, ll 2-4.

On cross examination he testified he sold the three and a half to four kilograms of cocaine to Sedrick Gaines and not Mr. Scott. App. at 947, l 16 to 948, l 6. He further testified that he called Mr. Scott numerous times on November 1, 2014, but again the Government produced no cell phone records to verify this fact. App. at 943, ll 16-25. He testified he went to a house Mr. Scott was renovating on two occasions. On both of those occasions his brother in law,

Olmo was driving. App. at 957, ll 6-23. He later said it was possible his brother made a third trip with him to a house that was being remodeled. App. at 965, l 18 to 966, l 16. Even something as simple as how much was his brother paid to make the trip is inconsistent. Mr. Bello testified he paid him about $500 per trip. App. at 963, l 21 to 964, l 9. His brother testified he was paid about $1500 per trip. App. at 646, ll 23-24. No transaction or communication between Mr. Scott and Mr. Bello was ever documented by text messages, cell phone records, wiretaps, tracking devices, or visual observations by law enforcement officers.

The Government also called Joselito Olmo, the brother in law of Joel Bello Henriquez. Mr. Olmo claimed to have been a driver for his brother in law on several trips to the Anderson, SC area. He originally claimed to have met Mr. Bello about a year after Mr. Bello was caught with the more than a million dollars. App. at 1248, ll 1-16. As the million dollar stop was on March 31, 2011 this would mean that Mr. Olmo met Mr. Bello in the year 2012. He later testified he met Mr. Bello in April of 2011, shortly after Mr. Bello was stopped with the million dollars. App. at 1256, l 8 to 1257, l 7. He also testified that the cocaine he drove to the Anderson area came from "Chuchi." He said he met "Chuchi" a month or two after he met Mr. Bello. App. at 1259, l 17 to 1260, l 19. This testimony is completely contrary to Mr. Bello who testified that after he was

stopped with the million dollars, "Chuchi" stopped supplying him with cocaine until the year 2012. App. 824, ll 728, ll 9-22.

Mr. Olmo filed a statement with the Court prior to trial stating he was not involved in this conspiracy. He denied he ever accusing his attorney of coercing him into signing a plea agreement. He testified that if any document were filed saying his lawyer forced him to sign the plea agreement, that document would be false. App. at 1239, l 18 to 1243, l 22. When his previous attorney, Steve Hisker, was called as a witness, he confirmed that he withdrew as counsel for Mr. Olmo because Mr. Olmo filed a document with the Court accusing him of coercing Mr. Olmo into signing the plea agreement. App. at 1564, l 8 to 1565, l 9.

The final co-defendant witness was Samuel Calhoun. On August 15, 2015 Mr. Calhoun was arrested coming back from Georgia with three kilograms of cocaine. App. at 1311, l 21 to 1312, l 24. He was the primary witness, other than Mr. Bello, against Mr. Scott as to the conspiracy to distribute marijuana charge. App. at 1293, l 10 to 1294, l 10. As Mr. Scott was acquitted of the marijuana conspiracy, the details of his testimony on that issue are of no importance.

Mr. Calhoun also testified that in 2008 he met Mr. Scott at the Sweet Shop in Anderson, SC. The alleged purpose of the meeting was to advise Mr. Scott on how not to get caught dealing drugs. App. at 1282, l 2 to 1283, l 14. As noted

earlier, this meeting could not have taken place as Mr. Scott was in prison for the entire year of 2008.[8]

Case Agent Jay Rajaee was the final witness for the Government. He was also the sole witness on the charge of false information to a law enforcement officer. Mr. Scott was acquitted of that charge also. As to the importance of cell phone calls, Agent Rajaee testified as follows:

> A. (By Mr. Rajaee) Well, with the advent of cellular technology, and cell phones, and everybody using one, understanding who is carrying a phone and kind of the use of that specific phone and who different people are talking to over that telephone is a big part of what we do. App. at 1384, ll 20-24.

Notwithstanding his acknowledgment of the importance of cross-referencing telephone calls in a drug conspiracy case, he never testified as to cross-referencing any calls to a phone used or accessed by Mr. Scott.

Agent Rajaee also testified that as he was bringing Mr. Bello back to Anderson from Atlanta, GA, Mr. Bello directed them to two houses of drug dealers. The house were the residences of Samuel Calhoun and Chee Davis. App. at 1445, l 24 to 1446, l 24. Mr. Bello was never asked by Agent Rajaee to direct them to a residence or house belonging to Mr. Scott. Nor did he volunteer to do

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[8] In his closing argument AUSA Andrew Moorman stated the year as being 2009. Mr. Scott was also in prison for all of 2009.

so. App. at 1467, l 14 to 1468, l 4. This is true notwithstanding the fact that Mr. Bello claims to have made numerous trips to Anderson to sell Mr. Scott drugs.

Agent Rajaee stated that he had a pole camera at a storage building rented by Mr. Scott and the one near a club he operated across from 5 Booker Street. He never had a pole camera at any house owned or used by Mr. Scott. App. at 1452, l 12 to 1453, l 25. He admitted putting a ping device on the cell phone of Mr. Scott to track its location as well as a tracking device on the automobile of Mr. Scott. App. at 1454, l 1 to 1455, l 21. He also admitted he never attempted to wire tap the phone of Mr. Scott. App. at 1455, l 22 to 1456, l 1. He admitted he could have taken phone records of all the alleged co-conspirators and compared them to each other to see how much contact they had. No testimony was presented that this was done in this case. App. at 1456, l 2 to 1457, l 5.

Mr. Scott called several witness on his own behalf who confirmed that he was in the business of buying and selling cars, promoting of entertainment and renting and renovating houses. Mr. Scott produce numerous document that supported his business dealings. The Government introduced several bank accounts in the name of Mr. Scott and his company, Hou-God Productions, LLC. The bank records reflect that Mr. Scott deposited over $100,000 in his accounts especially as it relates to his business dealings with CRM Services, LLC.

SUMMARY OF THE ARGUMENTS

Argument I

The 2006 indictment alleged a conspiracy to distribute more than 5 kilograms of cocaine from October 1, 2005 until the date of the indictment February 14, 2006. Eric Scott entered a guilty plea to this indictment. The superseding indictment in this case alleged a conspiracy to distribute more than 5 kilograms of cocaine from 2003 until the date of the indictment March 10, 2015. Mr. Scott plead not guilty to this indictment. Both indictments alleged Mr. Scott conspired with persons known and unknown to the Grand Jury. As the superseding indictment covered the entire time of the first indictment, the principles of double jeopardy prevented the Government from overlapping the two indictments. The superseding indictment should have been dismissed.

Argument II

In his testimony, Eric Scott testified after he went to prison in 2007, he told his mother he was not going to get back into the drug business. He testified that he told his cousin, Yaphet Thomas, that he was not going back into the drug business and encouraged Mr. Thomas to do the same. This testimony was sufficient under the law to create a jury question as to whether Mr. Scott withdrew from the alleged conspiracy more than five years prior to the indictment.

Argument III

In investigating this case, the attorney for Eric Scott obtained from the Spartanburg Detention Center telephone calls and recordings of visitation by and with Joel Bello Henriquez. In these phone calls Mr. Bello made several references to the fact he was looking at 12-15 years in prison but that he was expecting to receive a sentence of three to five years. He in fact received 42 months. Defense counsel should have been permitted to cross-examine this witness as to the punishment he expected to receive and why he expected to receive such a sentence. In addition, one witness had been told by the investigating officer that the witness was looking at a life sentence at the beginning of the interview. Failure to permit cross examination on these to facts deprived Mr. Scott of a fair trial as the true motive of the witnesses to testify for the government could not be explored.

Argument IV

Eric Scott's defense was that he was not part of any conspiracy prior to his being imprisoned other than the one to which he plead guilty. He requested a jury charge that the jury had to find that the conspiracy in this case was different from the one to which he plead guilty. The trial judge acknowledged that this was his defense. The trial judge erred in failing to give the jury a charge by which they

could find that Mr. Scott had not been involved in any drug dealing since his release from prison and that the old charge was simply part of this charge. If the jury believed those facts then they should be instructed to acquit Mr. Scott.

ARGUMENT

Question I

Did the trial Court err in failing to quash the indictment for a conspiracy to distribute cocaine, cocaine base, and marijuana that started in 2003 when Eric Scott had entered a guilty plea in 2006 to a charge of conspiracy to distribute cocaine when the charge in 2006 involved persons known and unknown to the grand jury and the testimony at trial established that Joel Bello-Henriquez was the same supplier of cocaine in each conspiracy?

Standard of Review

As this question involves a question of law, the Standard of Review is de novo. *United States v. Cheeks,* 94 F.3d 136 (4th Cir. 1996)

Discussion

The simplest way to understand this argument is to look at two hypothetical cases. While admittedly they are not likely to happen, they do illustrate the principle. Suppose the government indicts a defendant for conspiracy to distribute

5 kilograms or more of cocaine from June 1, 2015 until August 1, 2015. A defendant enters a plea of guilty to the charge. Could the government then indict him for a conspiracy to distribute more than 5 kilograms of cocaine from May 31, 2015 until August 2, 2015 without violating the double jeopardy provision of the Firth Amendment to the Constitution of the United States of America? The obvious answer is no. And if the second indictment expands the time of the conspiracy by two months or two years, it does not matter as long as the dates of the conspiracy overlap and the people involved, not the people alleged, are the same. The principle of overlapping conspiracy indictments has been addressed in several cases in the Fourth Circuit.

The District Court Judge initially found that Mr. Scott had not met his initial burden of proof of showing a non-frivolous basis for claiming a double jeopardy violation. Supp. App. at 88, ll 2-3. After the facts were fully developed, Mr. Scott renewed his motion. App. at 2203, l 14 to 2204, l 16. At the hearing for a new trial, the Government never disputed the fact that the common denominator between the two conspiracies was Joel Bello Henriquez. He supplied Mr. Scott with the drugs for the 2006 conspiracy indictment. He claims to have continued to supply Mr. Scott with drugs after Mr. Scott's release from prison. The 2016 indictment completely overlapped the conduct of Mr. Bello and Mr. Scott as

alleged in the 2006 indictment.

In *Short v. United States,* 91 F.2d 614 (1937) the Fourth Circuit held a second conspiracy indictment violated the double jeopardy provision of the Fifth Amendment even though the second indictment was brought in a different state than the first. In addition the Court held naming different people did not make the conspiracies different. As the Court said:

> Each of the North Carolina indictments names as defendants two persons, in addition to the defendant here interposing the plea of former jeopardy, who are indicted with him in the indictment before us; and each of those indictments, as does the indictment here, charges that the named defendants conspired, not only with each other, but also with other persons to the grand jurors unknown. Convictions under the North Carolina indictments could have been had, therefore, upon proof of conspiracy between any of the defendants there named and any other person; and the same is true of the indictment here. *Id.* at 621.

The same is applicable here. As both indictments alleged Mr. Scott conspired with person's unknown, the same facts could be used to convict Mr. Scott under the 2006 indictment and the 2016 indictment. The 2016 indictment would sustain a conviction of Mr. Scott buying drugs from Mr. Bello in October of 2005 and selling them to a named defendant in the 2006 indictment as the alleged conspiracy in the 2016 indictment started before October of 2005 and continued

until 2016. The times and the facts overlap. In this case the location of both conspiracies is the District of South Carolina. While the 2006 conspiracy may have been focused more in the Spartanburg area, the testimony in this trial established that drugs sells were conducted in the Greenville area also. In this case, the facts show that Walter Lee purchased drugs from Mr. Bello and sold them to Mister Crocker. This is legally no different from Mr. Scott purchasing drugs from Mr. Bello and selling them to one of the named defendants in the 2006 indictment. In neither indictment did the government allege a substantive offense against Mr. Scott.

The government should not be permitted to take an expansive view of a conspiracy for the purpose of including even peripheral defendants as part of the conspiracy and then take a much more narrow approach when one of those defendants raises an issue of double jeopardy. If the Government accepts the benefit of an expansive definition of conspiracy, it must also accept the burden of such a definition when a defendant elects to use the protection of the double jeopardy clause. *See*, *Krulewitch v. United States,* 336 U.S. 440 (1949). The Government elects whom to name in the indictment and the acts alleged to have been committed. After the facts are fully developed, the obvious answer as to who is the unnamed person in the 2006 indictment, is Mr. Bello.

The Government has argued that including the marijuana charge in the 2016 indictment made them different. This is simply artful drafting of the indictment. This Court has been critical of such artful drafting. "Unless the prosecution is utterly inept in drafting the two indictments, then, it will often be impossible for the defendant to carry the burden of proving that the two offenses charged against him are in reality one and the same." *United States v. Ragins*, 840 F.2d 1184, 1192 (4TH Cir. 1988).[9] If the Double Jeopardy provision of the Constitution is to afford a defendant any protections, the Government should have some obligation to make a meaningful distinction between the two indictment especially when the testimony shows the major participants are the same.

As this Court said in *Ragins*:

> In most instances, the "same evidence" test, pragmatically applied, provides adequate protection against successive prosecutions. In conspiracy cases, however, the peculiar characteristics of the offense itself present special problems that require application of an even more flexible test. The gist of the crime of conspiracy is the agreement to commit unlawful acts. But the same conspiracy may be established by different aggregations of proof, for a single agreement may continue for an extended period of time and involve the commission of numerous criminal acts. Strict application of the "same evidence" test to successive conspiracy charges would therefore permit the government to subject an accused to repeated prosecutions

[9] At trial Mr. Scott was acquitted of the marijuana and cocaine base charges. The testimony as to these two charges related to events after Mr. Scott was released from prison.

> for what is in reality the same criminal conspiracy, simply by selecting a different set of overt acts for each indictment. For this reason, this circuit, along with most others, has adopted a multi-pronged "totality of the circumstances" test to determine whether two successive conspiracy counts charge the "same offense" within the meaning of the double jeopardy clause. *Id.* at 1188

See, also United States v. Mallah, 503 F.2d 971, 984-985 (2nd Cir. 1974).

This Court has adopted a totality of circumstance test in determining double jeopardy. This Court said:

> [C]ourts have identified five factors to consider in evaluating double jeopardy claims: 1) time periods in which the alleged activities of the conspiracy occurred; 2) the statutory offenses charged in the indictments; 3) the places where the alleged activities occurred; 4) the persons acting as co-conspirators; and 5) the overt acts or any other descriptions of the offenses charged which indicate the nature and scope of the activities to be prosecuted.
> *United States v. MacDougall,* 790 F.2d 1135, 1144 (4th Cir. 1986)

Except for the overt acts, which are not alleged as to Mr. Scott in either indictment, Mr. Scott make a prima facie case under those requirements. The time periods are the same as the 2016 indictment overlaps the entire period of the 2006 indictment. The places where the drugs are sold also overlap. The statutory offense are exactly the same or virtually the same. Granted money laundering was included in the 2015 indictment, but these charges were dismissed by the Government. The testimony shows Mr. Bello brought drugs to Anderson, SC for Mr. Scott during the 2006 conspiracy period, just as he claims he did in during the

period of the 2016 indictment. Finally as noted, the alleged primary participants are Mr. Bello and Mr. Scott.

The facts of this case are very similar to *United States v. Jarvis,* 7 F.3d 404 (1993), which applied the five factors. Mr. Jarvis, a residence of Virginia, was indicted in Florida for a conspiracy to distribute more than 5 kilograms of cocaine. He had made several trips to Florida to purchase cocaine from a dealer named Duarte. He brought the cocaine back to Virginia to sell. The period of the conspiracy in Florida was from January 19, 1990 until January 22, 1990, although Mr. Jarvis had been going to Florida to purchase cocaine since August of 1988. He was convicted after a trial in November of 1990.

On April 25, 1991, a grand jury in the Eastern District of Virginia indicted Mr. Jarvis for conspiring to distribute more than 5 kilograms of cocaine. The indictment alleged the conspiracy was from June 1988 until April 25, 1991. The Virginia indictment also included several substantive counts, and a charge of traveling in interstate commerce to promote or facilitate the drug dealing. He was also convicted in Virginia.

This Court reviewed the case under the plain error rule. This Court noted that "[The] conspiracy prosecuted in the Eastern District of Virginia completely embraced the time period covered by the Southern District of Florida conspiracy."

Id. at 411. The same applies in this case. The 2016 indictment completely embraces the times alleged in the 2006 indictment. The Court in *Jarvis* further noted that while the first indictment was limited to Florida, the second indictment included Virginia and Florida. In the present case, both indictments include the District of South Carolina. In holding the prosecution in Florida barred the prosecution in Virginia, this Court said "The fact that the second prosecution alleged overt acts over and above those cited in the Florida indictment is irrelevant, so long as the conduct for which Jarvis was first prosecuted constitutes the entirety of the agreement element of the conspiracy alleged in the Virginia indictment." *Id.* at 412. Again, in neither indictment were there substantive offenses alleged against Mr. Scott.

This Court has also recently addressed again a case involving double jeopardy and conspiracies in *United States v. Jones*, 858 F.3d 221 (4th Cir. 2017). The facts in *Jones* are also very similar to the facts in this case. The first conspiracy involved from July 2012 to August 22, 2012. The second alleged conspiracy covered September 1998 until August 2012. One conspiracy was in the Eastern District of Virginia and the other in the Western District of Virginia. That fact did not prevent this Court from finding a single conspiracy. In conclusion in *Jones* this Court said "The Government's position is not so much a

principled legal argument as it is a post hoc rationalization for violating Appellant's constitutional rights." *Id.* at 230.

Granted the Government will argue that this case is different because they allege that Mr. Scott continued drug dealing even while he was in prison. If this is truly the Government's theory then they actually could argue that Mr. Scott's plea in 2006 could be used to convict him of this conspiracy because it was an admission by him that he sold drugs during the conspiracy period. If the Government contends that Mr. Scott plead to a different conspiracy in 2006, then they have offered no evidence of such. In addition, when Mr. Scott requested a jury charge that would have permitted the jury to determine if the two indictments covered one or two conspiracies, the Government did not consent to the charge. App. at 1934, ll 14-19. Furthermore, if the alleged continuation of the drug dealing after Mr. Scott was released from prison is the theory of this prosecution, there was no need to do a superceding indictment to include the period of time before Mr. Scott went to prison.

Under the Government's theory in this case. They could have accepted Mr. Scott's plea in 2006, sent him to prison and then while in prison indicted him when they finally caught Mr. Bello and could have given Mr. Scott additional prison time. *Short, Ragins, Jarvis* and *Jones* all hold this is not proper.

Perhaps the best argument to show the double jeopardy issue in this case is the closing argument of the Government. Mr. Scott testified. He admitted he had sold drugs in the past and that he had plead guilty to the charges. He testified that the only person he purchased drugs from was Mr. Bello. He was previously indicted for conspiring to sell more than 5 kilograms of cocaine. When asked on cross examination if he purchased kilograms of cocaine from Mr. Bello before he went to prison he truthfully answered he did. App. at 1793, l 6 to 1796, l 24. In closing argument, the Government argued that they could convict Mr. Scott based upon his testimony that he had purchased more than 5 kilograms of cocaine from Mr. Bello, which is the exact indictment to which he had entered a plea. Asking a jury to convict a defendant based solely upon the conduct to which he had plead guilty, violates the double jeopardy provision of the Fifth Amendment to the Constitution of the United States of America.

The government started out with an indictment for a conspiracy which had no double jeopardy problems. It was clean. They claimed the conspiracy started in 2008, while Mr. Scott was in prison. This was over one year after Mr. Scott went to prison. That case could be tried without any reference to overlapping times. That case could be tried without the issue of withdrawal from the conspiracy. That case presented straight forward factual question of did the

Government prove Mr. Scott started back into the drug business after his release from prison. Instead, the Government elected to make Mr. Scott's past an integral part of this case. They elected to make his past, and not his conduct after his release from prison, a basis for his conviction. This trial strategy violated the protections of the double jeopardy provision of the United States Constitution.

A citizen who has served his time in prison for a conspiracy and has reformed his life to become a better citizen has two protections under our law. One is the statute of limitation which is granted by the grace of the legislature. To invoke this protection a citizen must hope the Government does not indict him for five years and he must contact his former comrades in crime to tell them he is through with the conspiracy. In a conspiracy case, simply leading a good life is not sufficient to invoke the protections of the statute of limitations. The other protection, double jeopardy, is granted by our founding document in the Fifth Amendment to the Constitution. Without the protection of the double jeopardy clause, the government could continuously indict and prosecute a defendant as long as some of his conspirators continue the criminal enterprise. Without double jeopardy protection he would be required to write from prison or after he is released at least one conspirator withdrawing from the conspiracy and then hope the government waits at least five years to indict him again. As this Court has said

"The underlying purpose of the Bill of Rights is to protect the people from the power of the government." *Dunbar Corp. v. Lindsey*, 905 F.2d 754, 763 (4th Cir. 1990). With this purpose in mind, this Court should interpret the Fifth Amendment broadly to achieve its purpose.

To allow the Government to prosecute Mr. Scott under the facts of this case and not to give him the protection of the double jeopardy provision of the United States Constitution "is but to 'keep the promise to the ear and break it to the hope.'" *State v. Prescott*, 125 S.C. 22, 117 S.E. 637, 638 (1923)

Question II

Did the trial Court err in failing to give a charge of withdrawal from the conspiracy when the testimony established that Eric Scott was imprisoned from March 2007 until April 2011 and that he told others, including two co-conspirators that he was not going to be involved in the drug business after his release from prison which would have barred this prosecution due to the statute of limitations?

Standard of Review

As this question involves a question of law, the Standard of Review is de novo. *United States v. Cheeks,* 94 F.3d 136 (4th Cir. 1996)

Discussion

In deciding this issue, this Court should look at the facts in the light most favorable to Eric Scott. If any evidence exists that supports Mr. Scott's withdrawal from the conspiracy, the charge should be given. As the Fifth Circuit said "In deciding this case we must look at the facts in the light most favorable to defendant, since defendant is entitled to jury instructions relating to a theory of defense for which there is any foundation in the evidence." *United States v. Parker*, 566 F.2d 1304, 1305 (5th Cir. 1978). This is part of the right of a defendant to present a defense.

Viewing the evidence in the light most favorable to Eric Scott, the evidence shows that Mr. Scott went to prison in 2007. This was eight years before the first indictment. He was released from custody on April 9, 2011. He denied being involved in any drug transactions after his release from prison. He testified that he told his cousin, Yaphet Thomas, he was not going to sell drugs and that Mr. Thomas should do the same. App. 1753, l 16 to 1589, l 25. He also told Mr. Bello that he was not going back into the drug business. App. at 1760, l 19 to 1761, l 24. He testified to the numerous legal activities he was involved in to further support his intent not to go back to drug dealing. This testimony would support a finding that more than five years prior to the indictment in this matter,

Mr. Scott had decided to withdraw from the conspiracy and upon his release from prison.

While there appears to be a split among the circuits as to whether incarceration alone is sufficient to require a trial court to charge a jury on withdrawal, this Court in *United States v. West*, 877 F.2d 281 (4th Cir. 1989) has approved the line of cases followed in the Second Circuit that incarceration alone is sufficient to require the trial judge to give a charge on withdrawal. "Arrest and incarceration may constitute enough evidence of withdrawal to create a question for the jury." *United States v. Panebianco*, 543 F.2d 447, 453 (2nd Cir.1976), cert. denied, 429 U.S. 1103 (1977); *See, also United States v. Harris*, 542 F.2d 1283, 1301 (7th Cir.1976), cert. denied, 430 U.S. 934 (1977); *United States v. Cohen*, 516 F.2d 1358, 1364 (8th Cir. 1975).

As the Second Circuit said in *United States v. Leslie*, 658 F.3d 140, 143–44 (2d Cir. 2011):

> Leslie argues that imprisonment may be evidence of an affirmative act of withdrawal from a conspiracy; we agree. But 'while arrest or incarceration may constitute a withdrawal from a conspiracy, it does not follow that in every instance it must. In the trial context, evidence of imprisonment during a conspiracy is merely a relevant fact that entitles the defendant to a jury instruction on withdrawal.. The jury decides whether imprisonment constitutes a withdrawal 'in light of the length and location of the internment, the nature of the conspiracy, and any other available evidence." (Internal citations and

quotations marks omitted)

The Circuit has further said "We have recognized that '[a] conspirator who presents evidence of his imprisonment during the course of the conspiracy is entitled to a jury instruction on withdrawal.' *United State v. Salameh*, 152 F.3d 88, 150 (2nd Cir. 1998) (citing *Panebianco*, 543 F.2d at 453). "The issue of whether a conspirator's incarceration establishes withdrawal from the conspiracy 'must be decided by the jury in light of the length and location of the internment, the nature of the conspiracy, and any other available evidence.'" *Panebianco*, 543 F.2d at 454 n. 5.

The Government below relied upon *United States v. Smith,* 568 U.S. 106 (2013) for the proposition that Mr. Scott is not entitled to the withdrawal charge. The Government appeared to argue that *Smith* overruled this Circuit's opinion in *West.* This is not correct. All the *Smith* decision did was hold that the defendant had the burden of proving that he withdrew from the conspiracy. While *West* did recognize that incarceration may be a basis for withdrawal from the conspiracy, the case also recognizes that the Government, at that time, had the burden of disproving that the Defendant withdrew. That portion of the *West* decision was overturned by the *Smith* case. In the *Smith* case the sole evidence of his withdrawal was his incarceration. As the Court noted "Before trial, Smith moved

to dismiss the conspiracy counts as barred by the applicable 5-year statute of limitations, 18 U.S.C. § 3282, because he had spent the last six years of the charged conspiracies in prison for a felony conviction." *Id.* at 108. If the Supreme Court had intended to hold that incarceration alone is not sufficient to convict, they did not need to address the issue of the burden of persuasion.

In this case, as noted above, Mr. Scott presented ample evidence of his withdrawal from the conspiracy. The jury should have been able to consider this evidence.

Question III

Did the trial Court err in preventing counsel for Eric Scott from cross examining Joel Bello Henriquez as to his expectation of a three to five year sentence instead of 12-15 years when Mr. Bello made the statement to relatives over the telephone and during visitations as well as preventing cross examination of Derrick Jones as to his being told he was facing a life sentence?

Standard of Review

A district court's decision to limit cross-examination is reviewed for an abuse of discretion. *United States v. Ambers*, 85 F.3d 173, 175 (4th Cir.1996).

Discussion

Eric Scott acknowledges that his Court has held in *United States v. Cropp*, 127 F.3d 354 (4th Cir. 1997) that a district court judge may use their discretion in limiting cross examination as to possible punishment. As to the cross examination of Joel Bello Henriquez, Mr. Scott contends that the principles established in *Cropp* are not applicable. Notwithstanding this fact, Mr. Scott urges this Court to revisit the *Cropp* decision. The facts in this case establish that the attorney for Mr. Scott subpoenaed the phone and visitation recordings of Mr. Bello while he was incarcerated in the Spartanburg Detention Center. The calls were in Spanish and had been translated by an expert for the Defendant. In the calls Mr. Bello told various people he was looking at 12-15 years but was expecting 3-5 years. App. at App. at 884, l 20 to 896, l 24. A certified copy of the translation was introduced by Mr. Scott. App. at 2170. The translation showed that Mr. Bello told the other person he was looking at 12-15 years but was expecting to get 3-5. App. at 2175 at 12:12; 2177 at 9:29. In fact Mr. Bello was sentenced to 42 months for over 200 kilograms of cocaine. Docket Entry 1300.

The purpose of the cross-examination of Mr. Bello was to show he had an expectation of a very specific sentence, not that he was simply seeking a reduction in his time. When his expectation turns out to be true, then the obvious question

become was he in fact promised a specific sentence. He did not testify that he was expecting a specific sentence. This cross-examination goes beyond simply impeaching Mr. Bello on his hope. It goes to what he has been promised.

As the United States Supreme Court has said "Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. *Davis v. Alaska*, 415 U.S. 308, 316 (1974). Only the fullest cross-examination can reveal the truth. Cross-examining a witness about the hope of a reduction is entirely different from cross-examining a witness about his expectations, especially if the expectations turn out to be true.

Prior to cross examination of Derrick Jones, Mr. Scott's attorney sought permission to cross-examine him on the fact that he was told he was looking at life without parole. App. at 366, l 10 to 367, l 3. A mandatory life sentence is certainly more than a substantial sentence, which defense counsel was allowed to ask. The common fear among some courts is that a jury may know the possible sentence the defendant may receive. The simply answer is as the law presumes a defendant knows the possible punishment of the crimes he committed then the law can presume a jury knows the possible punishment. If the jury is told the possible punishment a defendant may receive, then the jury is being told nothing that the law does not presume they know. A jury would certainly look differently at a

witness who is facing a mandatory life sentence.

Repeatedly throughout the trial, Judge Cain told the jury concerning witnesses who have entered into a plea agreement with the government "You should keep in mind that such testimony is always to be received with caution and weighted with great care." App. at 224, ll 11-13. Law review writers have known that the testimony of informants is a major cause of wrongful convictions. *See* Peter A. Joy, *Brady and Jailhouse Informants: Responding to Injustice,* 57 CASE WESTERN RESERVE LAW REVIEW 619 (2007); *See also United States v. Luck*, 611 F.3d 183, 187-88 (4th Cir. 2010)(A report by the Center on Wrongful Convictions at Northwestern School of Law describes fifty-one wrongful capital convictions, each one involving perjured informant testimony accepted by jurors as true.) If the Courts and the studies know the unreliability of informants who are testifying to help themselves, what reason exists to limit the cross-examination of the informant.

In *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986) the United States Supreme Court said:

> In this case, however, the trial court prohibited all inquiry into the possibility that Fleetwood would be biased as a result of the State's dismissal of his pending public drunkenness charge. By thus cutting off all questioning about an event that the State conceded had taken place and that a jury might reasonably have found furnished the

> witness a motive for favoring the prosecution in his testimony, the court's ruling violated respondent's rights secured by the Confrontation Clause.

If a the dismissal of a simple public drunk charge can be grounds for attacking the credibility of a witness, how much more valuable to attack the credibility of a witness is the jury knowing the witness was looking at life without parole before he gave a statement. What is the compelling governmental interest in prohibiting defense counsel from asking if Mr. Jones was informed he was looking at a life sentence? The Government does not dispute the statement was made. A jury could even interpret the statement as threat if he did not cooperate with the Government. What is the Government interest in keeping from the jury the fact that Mr. Bello believes he has secured a deal that reduces his exposure from 12 to 15 years to three to five years. What Government interest trumps Mr. Scott's right to expose the bias of two witnesses against him.

Question IV

Did the trial Court err in failing to give a jury charge that would have required the jury to find that the if the jury finds that Eric Scott did not participate in the conspiracy after he was released from prison, then the jury would have to find that the conspiracy with Mr. Bello before Mr. Scott went to prison was not part of the conspiracy to which Mr. Scott entered a plea?

Standard of Review

As this question involves a question of law, the Standard of Review is de nova. *United States v. Cheeks,* 94 F.3d 136 (4th Cir. 1996)

Discussion

Eric Scott's defense was that the charges against him in the 2016 indictment is simply part of a conspiracy to which he plead guilty in 2006. He contended that he had not been involved in any drug transaction since his release from prison. If that is true, then he cannot be convicted as both double jeopardy and the statute of limitations would prevent his conviction. The trial judge ruled pre-trial that the 2006 indictment was not part of the 2016 conspiracy indictment. Although Mr. Scott contends that the 2006 conspiracy indictment is the same as the 2016 conspiracy indictment, at the least a factual question exists as to whether the 2006 was the same conspiracy or a different conspiracy.

Mr. Scott proposed a simple jury charge to permit the jury to resolve this factual question. The charge read:

> If you find the government has not proven beyond a reasonable doubt that Mr. Scott participated in the conspiracy after his release from prison, then in order to convict Mr. Scott you must find beyond a reasonable doubt that his drug dealings with Mr. Bello were part of this same conspiracy and not part of the prior conspiracy to which Mr. Scott plead guilty.

This simple charge would have permitted the jury to determine if there were two conspiracies and not one. It would have permitted the jury to determine if Mr. Scott reformed his life after he left prison and is entitled to the protections of the double jeopardy provision of the Constitution.

Scant cases have been found in which a court holds that a defendant is entitled to a jury charge on the question of double jeopardy. The reason is simple, few lawyers would want the jury to know their client has been convicted of a crime. They prefer to let the judge make the decision. This cases is one of those exceptions.

In *Strickland v. State*, 40 Ala. App. 413, 415, 115 So. 2d 273, 274 (Ala. Ct. App. 1959) the Court of Appeals said "We see, on the record before us, nothing but a question of fact for the jury on this issue." A New York Court held " This and other testimony shows that there arises at least a

question of fact for the jury, whether there was one blanket agreement or two. It may well be that defendant has participated in two distinct conspiracies. But on this record that was for the jury to say, since a question of fact was presented." *People v. Silverman*, 281 N.Y. 457, 461, 24 N.E.2d 124, 126 (1939) *See also Banks v. State*, 244 Ga. App. 191, 192, 535 S.E.2d 22, 24 (2000)(recognizing a trial court submitted jury question on double jeopardy to the jury, but declining to rule upon the appropriateness of the charge as it was not preserved for review.) There is no reason not to ask the jury to decide the double jeopardy issue when it is a factual issue and is in fact the defense used by the defendant. This simply ensures that a defendant has the right to present his defense.

This Court should reverse the conviction of Eric Scott on the failure of the trial judge to permit the jury to determine if the double jeopardy rights of Mr. Scott have been violated.

CONCLUSION

For the foregoing reasons, this Court should reverse the conviction of Eric Scott and on Question I, remand with instructions to dismiss the indictment. On Questions II through IV the matter should be remanded for a new trial.

November 20, 2016

C. Rauch Wise
C. RAUCH WISE
305 Main Street
Greenwood, SC 29646
(864) 229-5010
rauchwise@gmail.com
District Court № 04723

Attorney for
Eric Torrance Scot

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
Effective 12/01/2016

No. 17-4458 **Caption:** US v. Eric Scott

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